IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 5 of 2006
WITH
CIVIL APPLICATION NO.391 OF 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NAVINCHANDRA GULABRAI KOTAK - Appellant(s)

Versus

YOGESHWAR CONSTRUCTION CO. & 10 - Defendant(s)

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Appearance :
MR.PAHVA, LEARNED ADVOCATE FOR M/S.THAKKAR ASSOC. for Appellant(s): 1,
None for Defendant(s) : 1 - 11.
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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 20/01/2006

ORAL JUDGMENT

This Appeal from Order arising out of an order below Exh.33 in Special Civil Suit No.106 of 2004, passed by the learned 5th Additional Senior Civil Judge, Rajkot on 31/12/2005, rejecting the said application.

2. The appellant preferred the Special Civil Suit No.106 of 2004 making prayers in respect of properties viz. Shop No.8 and Banking Hall as described in the suit (hereinafter referred to as the 'suit property'). The prayer in the suit is to direct the defendants No.1 to 10 to execute registered sale-deed in light of an agreement to sell executed on 3/10/2001 in favour of the plaintiff-appellant. Alternative prayer is for damages and the third prayer is against defendant No.11 requiring defendant No.11 not to sell the second property, if out of the sale proceeds for first property, bank's dues are recovered and to direct defendant No.11 – Bank to handover the possession to the plaintiff.

3. Pending the suit, present application – Exh.33 is preferred, where prayer is made for injunction against defendants No.1 to 10 in respect of suit property and defendant No.11 not to sell the second property, if out of the sale proceeds of first property, bank's dues are recovered and to handover the second property to the plaintiff. Wherein, their prayer which seems that if both the properties are sold out, the Bank may recover it's dues out of the sale proceeds and pay excess amount to the plaintiff.

4. The trial Court after considering the rival side contentions, came to a conclusion that the plaintiff has no prima-facie case, the balance of convenience does not tilt in favour of the plaintiff and that he is not likely to suffer irreparable loss and ultimately, rejected the application.

5. Learned Advocate, Mr.Pahva, appearing for the appellant submitted that the prayers made by the plaintiff are innocuous. It does not affect the right of the Bank. All that he is praying by filing the suit and making the prayer for interim-relief is protection of the plaintiff's interest. Mr.Pahva, submitted that the Court below has committed an error in relying on an order passed by Civil Court in Special Civil Suit No.110 of 2004, to which the plaintiff is not a party. Mr.Pahva, also submitted that the Bank's interest is not sought to be put in jeopardy by the order sought, and therefore, the relief sought, ought to have been granted by the trial Court. This Court, may therefore, entertain this appeal and protect the interest of the plaintiff-appellant.

6. This Court has taken into consideration the order in question and other relevant aspects indicated by learned Advocate, Mr.Pahva. At the outset, it may be

noted that defendant No.11 is an Officer of Jivan Commercial Co-operative Bank Limited. The possession of suit properties have been taken under Securitization Act (enforcement) 2002 and is now sought to be auctioned, as can be seen from an advertisement published in a newspaper on 13/1/2006 Annexure – A to the Civil Application herein.

7. The plaintiff-appellant is found to be not in possession, which is not in dispute also. The plaintiff claims his right over the property on basis of a registered document of agreement to sell, registered on 3/1/0/2002, subsequent to which no sale document is executed. The right between the plaintiff and other defendants and the Bank is yet to be adjudicated, whereas the right between the Bank and other defendants has already been adjudicated and pursuant thereto action is taken under Securitization Act (enforcement) 2002. When the right of the plaintiff is not crystallized nor is adjudicated upon, granting any injunction against him, would tantamount to creating a hurdle in the legal process. The plaintiff is neither the owner nor the occupier of the suit property. Alternative prayers which are sought viz. either to sell only one property, if in all these sale

proceeds are sufficient to fulfill the dues of the Bank, handover the rest of the property to the plaintiff, would amount to implementation of the agreement to sell, in absence of a sale-deed or adjudication in favour of the plaintiff. Likewise, if the second alternative prayer is seen, it would have the same effect in a different form viz. that this excess amount after sale of both the properties are to be handed over to the plaintiff, the plaintiff's claim on basis of agreement to sell would be executed without adjudication. Neither of this can be permitted at this interim stage. In the opinion of this Court, therefore, no error can be said to have been committed by the trial Court. The Court finds no merits in the appeal. The appeal must fail and stands dismissed.

8. In view of the dismissal of the appeal, Civil Application No.391 of 2006 would not survive and stands dismissed.

(A.L.DAVE, J.)

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